

The Right to Freedom of Expression and its Regulation in National and International Legislation

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Abstract: In international commercial disputes the extension of jurisdiction concerns the situation where a court extended its jurisdiction to the detriment of another abroad. Such an extension would not work but with an absolute breach of jurisdiction of other states. However, one cannot ignore the fact that article 25 of Regulation (EC) no. 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters refers to mandatory reporting lack of competence whenever the court finds that a claim is another instance of a Member State of the Union shall have exclusive jurisdiction, text that indicate that incidental or accessory applications remain in the national court seized of the original proceedings. Although in theory it was argued that the *lis pendens* - related actions has no effect on international trade dispute, we can note that in relation to European Union member states *lis pendens* creates a special case of mandatory suspension of the case, while related actions a special case of voluntary suspension.

Keywords: international commercial disputes, exclusive jurisdiction, prorogation of jurisdiction, *lis pendens*, related actions

1. Introduction

The origin and the development of human rights are as the origin and evolution of the law.¹ Having some glimpse into the mind of ancient times, the idea that the human being, by its nature, it posses certain rights, independent of any legal order, it evolved over time leading to the what is known today the institution of human rights. Represented by the stoics, jurisprudence, Christianity, this idea is found both in Greek and Roman naturalist system of antiquity.²

Contemporary Interest for human rights developed as a direct reaction to human inhumanity towards the man of the Second World War.³

It seems that mankind has perceived fully, even before the beginning of the third millennium the message of the Universal Declaration of Human Rights under which, "the ignorance and contempt for human rights have resulted in barbarous acts

¹ Barac, Lidia, *Europa și drepturile omului, România și drepturile omului*; București, Editura Lumina Lex, 2001, p. 1.

² Georgio del Vecchio, *Diritto naturale e unita europea*, Roma, 1959, p. 95.

³ Montgomery, Johh Warwick, *Drepturile Omului & Demnitatea Umană*, Oradea, Editura Cartea Creștină, 2004, p. 18.

which have outraged the conscience of mankind" and that "recognition of the inherent dignity of all the human family members of and their equal and inalienable rights, represent the foundation of freedom, justice and peace in the world".¹

This message is a change of attitude, which expresses a wise reconsideration of the human's role and place in political, economic, social and cultural structures.² Receiving this message has led to the development of the Universal Declaration of Human Rights, by the United Nations and of other tools that govern the human rights (Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights), but at the foundation of the European Convention on Human Rights and the legal mechanism for implementing it, and devoted to a constitutional level of the guaranteed rights by international instruments in this area.

Considered as the most powerful weapon to defend the rights and freedoms of individuals against any anti-democratic events³, the right to freedom of expression is among the rights guaranteed by international tools and at constitutional level, in doctrine was showed that⁴, "no progress can be designed in scientific, cultural, artistic, domain without the existence of freedom of expression beyond any state borders ..."

2. International regulation of freedom of expression

Democratic development of society requires pluralism of ideas and concepts about the world and life, about social organization, about the relationship between members of society. As social beings, people need to receive ideas and information and to express, in any form, their own ideas and concepts.⁵ It is the reason for which the right to freedom of expression is guaranteed by international tools on human rights.

The first international document that dedicates the right to freedom of expression is the Universal Declaration of Human Rights adopted by UN General Assembly on December 10th, 1948, a solemn document that lays at the basis of the whole system of rights and freedoms built after Second World War. In article 19, this document states that: "Any individual has the right to freedom of opinion and expression, which implies the right of not to being disturbed for his opinions and that to seek, receive and spread, without border considerations, information and

¹ Iancu, Gheorghe, *Drepturile, libertățile și îndatoririle fundamentale în România*, București, Editura All Beck, 2003, p. 1.

² Muraru, Ion, Iancu, Gheorghe, *Drepturile, libertățile și îndatoririle constituționale*, partea I, I.R.D.O., București, 1992, p. 3.

³ L.A.D.O., C.E.D.O., accompanied by explications and comments, I.R.D.O., 1994, p. 37.

⁴ Bârsan, Corneliu, *Libertatea de exprimare în Convenția Europeană a Drepturilor Omului*, in *Studii juridice și Economice*, București, Editura Economică, 2001, p. 10.

⁵ Bârsan, Corneliu, *Convenția Europeană a Drepturilor Omului – Comentariu pe articole*, vol. I. Drepturi și Libertăți, București, Editura. C.H. Beck, 2005, p. 728.

ideas through any means of expression."¹

Another international instrument governing the right to freedom of expression is the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on December 16, 1966 and came into effect on March 23rd, 1976. This legal tool are established in article 19, in symmetry with the Universal Declaration of Human Rights, whose stipulations he reiterates, freedom of opinion and speech in two separate paragraphs.

In the regionally European area, the Convention on Human Rights and Fundamental Freedoms, adopted on November 4, 1950, at less than two years after the adoption of Universal Declaration of Human Rights, subscribes among civil an political also the rights to freedom of speech.

According to article 10 paragraph 1 of the Convention, "Everyone has the right to freedom of expression. This right shall include freedom to opinions and freedom to receive and communicate information and ideas without interference by public authority, regardless the frontiers". This article "does not prevent the States from requiring the society of radio-fusion, cinema or television, a special authorization regime."²

Article 10 of the European Convention of Human Rights serves as a framework for the legislation, in adopted matter at the level of the European Communities.

Thus, article 10 paragraph 1 of C.E.D.O. is given the exact content within article 11 paragraph 1 entitled "Freedom of speech and information" in the EU Charta of Fundamental Rights proclaimed at the Nice European Council of December 7, 2000. In paragraph 2 of this article there are guaranteed the freedom and pluralism of the media information means.

The right to freedom of speech is regulated also by legal tools adopted in other regions.

For example, the American Convention on Human Rights, adopted on November 22, 1969 in San Jose (Costa Rica) regulates the right to freedom of speech in article 13 which states that "Everyone has the right to freedom of thought and speech; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, without taking into account borders, either oral or written, printed or artistic form or by any other means of their choice."³

Also, the African Charta on Human and People Rights, adopted at the 18th

¹ Taken from article 19 of the Universal Declaration of Human Rights adopted by UN General Assembly on December 10th, 1948, signed by Romania on December 14, 1955.

² Extract from Article. 10 paragraph 1, of European Convention of Human rights, Adopted in Rome on November 4th, 1950, came into effect on 09.03.1953 and ratified by Romania by Law no. 30/05.18.1994 on May 31, 1994.

³ Extract from Article. 13 of the American Charter of Human Rights adopted on November 22, 1969 in San Jose, published in John Vida, "Human Rights in International Settlements, București, Editura Lumina Lex, 1999, p. 622.

Conference of Heads of State and Government in Nairobi (Kenya) in June 1981, in article 9, it covers two separate paragraphs, the right to information and freedom of speech.¹

Similarly, the Declaration of Fundamental duties Asian people and states, adopted in Djakarta (Indonesia) on December 9, 1983, the Regional Council on Human Rights in Asia, in article 1 entitled "Fundamental Principles", in paragraph 2, it lists the rights and freedoms that must be obeyed, secured, protected and preserved by the signatory States; among those rights there are set out in paragraph 2.07 also the right to freedom of opinion and speech, as it was set out in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. In article 7 entitled "Means of mass communication", it was regulated separately, the freedom of the press.² The Universal Islamic Declaration of Human Rights adopted on September 19, 1981 at the Islamic Council, the chapter XII "The right to freedom of religion, thought and speech", the letters a and d, are subject to freedom of opinion and the dissemination of information.³

We have seen how freedom of expression is regulated in international legal instruments that concern human rights, however, the exponential development of international human rights competence sphere could never leave untouched the national legal systems, the internal law must adapt and conduct themselves in accordance with International Human Rights Law. The reaction of the internal law is manifested by regulating the level of constitutional rights and freedoms assigned to the international legal tools.

Freedom of speech, as one of the essential foundations of a democratic society is governed by the constitutions of all countries that have a democratic regime. The first amendment to the United States' Constitution guarantees freedom of speech and press.⁴ Japan's Constitution, in article 21, states all together "freedom of opinion,

¹ African Charta on Human and People's Rights adopted in Nairobi (Kenya) in June 1981, published in John Vida, "Human Rights in International Settlements" București, Editura Lumina Lex, 1999, p. 650, in article 9 states: "Everyone has the right to information. Everyone has the right to express and disseminate his opinions within the laws and regulations."

²Data collected from the Declaration of Fundamental Duties of Asian peoples and states adopted in Djakarta in December 9, 1983, published in Ioan Vida, "Human Rights in International Settlements", Editura Lumina Lex, Bucuresti, 1999, p. 667, 668 and 677.

³ Universal Islamic Declaration of Human Rights, adopted on September 19, 1981, the Islamic Council, published in Ioan Vida, "Human Rights in International Settlements, Editura Lumina Lex, Bucuresti, 1999, p. 690, in the chapter XII "The right to freedom of religion, thought and expression", points a and d, state:

a) "Everyone has the right to express thoughts and beliefs to the extent that they remain within the limits prescribed by law".

d) "There should be no obstacle to spread information, since it does not endanger the security of society or the state and it remains within the limits imposed by law"

⁴ 1st Amendment of the S.U.A. Constitution Published in: Călinoiu, Constanta, Duculescu, Victor, Duculescu, Georgeta, *Drept Constitutional Comparat - Tratat*, vol I, Bucuresti, Editura Lumina Lex, 2007, p. 160, states: "The Congress cannot develop any law that ... reduces the freedom of speech or

press, and expression in any way.”¹ In Europe, the French Constitution includes in its preamble the Citizen Declaration of Human Rights, adopted on October 27, 1946, which provides in article 11: "Free expression of thought and opinion is one of the most precious human rights; every citizen may therefore speak, write, print, freely, under the condition that they may meet the misuse of this freedom in cases determined by law".²

United Kingdom, although it gave the idea and the example of written constitutions, however, it has no written constitution, the English constitution is today presented as a written and unwritten particle.³ The written part of the English constitution includes several constitutional stipulations drafted in writing, among them being found also the "Bill of Rights" (February 13 1689), which contains a list of rights and freedoms guaranteed at the constitutional level. This constitutional act in article 9, guarantees the freedom of speech.⁴

The German Constitution, in article 5, regulates the freedom of expression, freedom of information, freedom of press and freedom of artistic and scientific expression.⁵ The Constitution of Switzerland, in article 16, regulates together the freedom of opinion and freedom of information; the freedom of the media is regulated separately in article 17.⁶ Russia's Constitution covers in the article 29, the freedom of opinion (freedom of thought and speech), of media and the right to information.⁷ Finally, the Danish Constitution guarantees the freedom of expression in article 77.

We see from these examples, that the right to freedom of expression is regulated by both international instruments and constitutions of democratic states, under various names (freedom of speech, freedom of expression, the right to freedom of expression) and forms of content (some tools, under the above mentioned names, regulate the freedom of opinion, freedom of information and freedom of the press, others containing a separate regulation of these three components).

the press.”

¹ Extract from article 21 of the Japanese Constitution, published in: Călinoiu, Constanta, Duculescu, Victor, Duculescu, Georgeta, *op. cit.*, p. 468.

² Extract from article 11 of the Declaration of Human Rights and Citizen, the Preamble of the Constitution of France, published in: Constanta Călinoiu Victor Duculescu, Georgeta Duculescu, *op. cit.*, p. 261.

³ Muraru, Ioan, Tănăsescu, Elena Simina, *Drept constituțional și instituții politice*, ediția a-12-a, București, Editura All Beck, vol. I, 2005, p. 47.

⁴ The data are taken from *Bill of Rights*, published in: Călinoiu, Constanta, Duculescu, Victor, Duculescu, Georgeta, *op. cit.*, p. 342.

⁵ The data are taken from German Constitution, published in Călinoiu, Constanta, Duculescu, Victor, Duculescu, Georgeta, *op. cit.*, p. 396.

⁶ The data are taken from Switzerland Constitution, published in Călinoiu, Constanta, Duculescu, Victor, Duculescu, Georgeta, *op. cit.*, p. 40.

⁷ The data are taken from Russian Constitution, published in Călinoiu, Constanta, Duculescu, Victor, Duculescu, Georgeta, *op. cit.*, p. 123.

3. Internal regulation of freedom of expression

Romania signed the Universal Declaration of Human Rights on December 14, 1955 and ratified the International Covenant on Civil and Political Rights on October 31, 1974, by the Decree no. 212/1974, and the European Convention on Human Rights, May 31, 1994, by Law no. 30/1994. Also, Romania, as a member of U.E., is held also by the Charta of Fundamental Rights of the European Union under the principle of the priority application of the Community law.

The Status, in internal law, of the international legal tools listed above, is governed by article 11 in conjunction with article 20 of the Romanian Constitution. According to article 11 of the Constitution, the Romanian state, through the competent public authorities, is obliged to meet, rightfully and in good faith the obligations under the treaties to which it is party; these treaties through ratification by the Parliament are part of the internal law. According to the revising law in November 2003, after assimilating these treaties into internal law, in paragraph 3 of article 11, it has been provided that, if such a treaty is contrary to constitutional stipulations, the ratification can take place only after revising the Constitution.

Meanwhile, according to article 20 of the Constitution, in the domain of human rights, the stipulation of the concluded treaties for the protection of these rights have priority over the internal laws; if there is an inconsistency between the stipulations of such treaties and pacts and laws, it shall be applied the first, on the basis of their priority.¹ A new rule introduced by revising law of the Constitution, which enriches the content of article 20 of the Constitution, makes the law enforcement more favorable, providing that priority application of international regulations is accepted only if the Constitution and the internal laws contain more favorable stipulations.

Considering international human rights in the freedom of expression, the Romanian Constitution regulates the article 30, including it in the category of fundamental rights, freedom of expression, stating the essential attributes of freedom of expression and the limits to exert this right. In the same article it is regulated, at paragraph 3 also the freedom of the press.

In article 31 of the Constitution is covered separately, the right to information, the constitutional text establishing the content of this right, its exercise limits and obligations of public authorities facilitate the exertion of this right. In the content of article 31 there are covered aspects in the mass means of information and public radio and television services.

Another relevant article, 53, of the Constitution, regulates the restrictions upon the exercise of the rights and freedoms. Although this article contains conditions that the European Court analyses in case of authority control interference

¹ Constantinescu, Mihai, Iorgovan, Antonie, Muraru, Ioan, Tănăsescu, Elena Simina, *Constituția României revizuită – comentarii și explicații*, Editura All Beck, București, 2004, p. 13.

with the exercise of the right of free speech, that the legality and necessity of the measure in a democratic society and its proportionality with the invoked legitimate purpose, the restrictions on motives such as: "the deployment of penal instruction" and "public morality" overcome the restrictions permitted by international human rights treaties (treaties allow general derogations in case of war or other public danger that threatens the life of the nation - article 15 ECHR and article 4 of the International Covenant on Civil and Political Rights are almost identical).¹

In penal matters there are regulations that affect the freedom of expression: article 205, 206, 207 Penal Code (insult, slander, validity sample), article 236 Penal Code (offenses against authority), article 166 Penal Code 1681 (communication of false information), article 169 Penal Code (disclosure of secrets that endanger state security), article 166 Penal Code (propaganda in favor of totalitarian state), article 166, Penal Code (actions against the constitutional order), article 317 Penal Code (incitement to discrimination), article 272 Penal Code (pressure on the justice) and the Penal Code article 272 (defiance of judicial bodies), the last two offenses are covered by Emergency Ordinance no 31/2008 to complete the Penal Code.

In civil matters, they have incidence the depositions on how to repair the prejudice (article 998, 999 of Civil Code - persons may be held accountable for their own conduct; article 1000, paragraph 3 Civil Code - the liability for the acts of civil servants, article 1003 Civil Code – solidar liability), taking into consideration article 30 paragraph 3 of the Constitution which provides that the exercise of the right to freedom of expression may not prejudice the rights of another person and the stipulations of article 30 paragraph 8 of the Constitution relating to civil liability for any information or creation made public.

Among the special normative acts relevant to the matters we mention: Law no. 544/2001 on access to information of public interest, Law no. 677/2001 for the Protection of Persons concerning the Processing of Personal Data, Law on protecting classified information no. 482/2002, Law on decisional transparency in public administration no. 32/2003, Audiovisual Law no. 504/2002.

4. Conclusions

This work tried to capture the essential aspects of the right to freedom of expression, the human right assigned to international regulations in matter and as the fundamental right covered at the level of the constitution and rules of national legal systems of democratic states.

Freedom of expression is considered the most powerful weapon to defend the rights and freedoms of individuals against any anti-democratic events.

¹ Țândărescu, Bianca, *Problematika reparării daunelor morale din perspective*, art. 10 of C.E.D.O. and of the relevant national and international jurisprudence, published in *Jurisprudență C.E.D.O. – studii și comentarii, sub egida Institutului Național al Magistraturii*, coordonator Dragoș Bogdan, Mihai Selegean, 2005, p. 307.

In relation to notions as "right" and "freedom" to those of "fundamental rights" and "human rights" or those "human rights" and "public freedoms", as defined in doctrine, we noticed that the right to free speech is a right and freedom at the same time (the two concepts are similar in the opinion of most authors) and it is also a human right and public liberty, a fundamental and citizen right. By reporting the division right in the objective and subjective right, freedom of expression is also a subjective right.

The analysis of international and constitutional rules that protect the freedom of expression, allowed us to see that this right is assigned to these tools under various names and forms of content.

As a second generation, the right to freedom of expression is both an individual and a convivial right, allowing communication with others, with the holders of physical and legal persons as subjects of internal law, mainly, but also as subjects of international law, to the extent that it is recognized their ability to work directly for the valuing this right.

This right induces in the task of states the correlative, negative and positive obligations; state authorities have not only the general and negative obligation, to refrain to bring negative prejudice to the right to free speech, but also the positive obligation to take all necessary measures to ensure the exertion of this law and of appropriate safety measures.

The right to free speech, the only one to which is guaranteed the border protection by international tools in this field, has a broad scope, which limits around notions such as: opinions, ideas, information, concepts whose content has been explained and enriched by the European Court of Human Rights Jurisprudence.

Exercising freedom of speech can not be beyond reasonable limits, the right to free expression is not an absolute right. The exercise of this right includes duties and responsibilities, and abusive exercise attracts liability (criminal or civil, depends), those that exceed certain limits related to defending the essential values, such as: national security, public order and safety, morals or protection of rights and freedoms of others.

International and constitutional tools provide the possibility of restricting the exercise of the right to free expression, the measures may consist of formalities, restrictions, conditions or penalties. Such interference in the exercise of the right of free speech must meet certain conditions, in order not to undermine the protection conferred to this right by the rules that it establishes.

The conditions imposed to the inferences of the state authorities, in the exercise of freedom of expression, consists of: the stipulation in the law, pursuing a legitimate aim, the necessity in a democratic society and proportionality to the legitimate pursued aim, have generated a rich jurisprudence of the European Convention on Human Rights bodies, which have gave substance to these conditions and had effect on rules and jurisprudence of States Parties to the European Convention on Human Rights.

Receiving international human rights standards and benchmarks set in by its jurisprudence by the European Court of Human Rights, the Romanian Constitution and national legislation contain regulations that ensure the adequate protection of the right to free expression, under the condition of proper implementation.

Freedom of expression represents one of the essential foundations of a democratic society. In its jurisprudence, the Court in Strasbourg has conferred to the freedom of expression a primary place among those guaranteed by the Convention, in particular by the reference to one of the freedoms that come in its content, media freedom, which is a *sine qua non* of the current constitutional democracy.

For the freedom of speech to truly exist, it is not sufficient the simple proclamation of international documents at constitutional level. To speak of such a fundamental right, it is necessary its appliance and defense by the internal judge, both at the level of common law and of constitutional contentious. The general role of guarantor judge of fundamental rights and freedoms is emphasized in the case of freedom of expression, freedom for which the positive law provides many limitations. In this sense it requires a proper control of proportionality, which must not tend towards the impunity of those who abuse of the freedom of expression, but it must lead to the establishment of appropriate sanctions.

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